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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 485

LEE ON, TOM LEE LING, DO HONG CHEW, YUEN GONG LEE, CHIN MON, CHEW GONG, CHIN LIN, FONG TONG, LEE LIM, YEE SOON and CHIN HAI,
Petitioners,

vs.

JAMES LONG, individually and as Sheriff of Contra Costa County, State of California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	5
Statutes involved	6
Statement of facts	6
Specification of errors to be urged	8
Reasons for granting a writ of certiorari	8
(1) The conflict created	9
(2) The imposition of a forfeiture by the court where forfeiture is specifically prohibited by law	10
(3) The imposition of extra and additional penalties upon certain individuals	12
The importance under federal law and on the grounds of public policy of the granting of this writ of certiorari	13
Conclusion	14

Table of Authorities Cited

Cases	Pages
Brinkerhoff-Faris Trust and Savings Company v. Held, 281 U.S. 673	12
Gelston v. Hoyt, 16 U.S. 246	9
Sunday Lake Iron Company v. Wakefield Township, 247 U.S. 350	12
United States v. Palmer, 16 U.S. 610	9

Codes

Penal Code of California:	
Section 330	6
Section 2604	6, 7, 10, 11, 12
28 U.S.C., Section 1257(3)	2

Constitutions

United States Constitution:	
Article I	9
Article III	9

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the

State of California, entered in the above entitled case on June 29, 1951.

OPINIONS BELOW.

On June 29, 1951, the Supreme Court of the State of California, by a three-to-four decision, reversed the opinion of the California District Court of Appeal, First Appellate District, Division Two. The opinion of the Supreme Court of the State of California (R. .....) is reported at 37 A.C. 500. The opinion of the California District Court of Appeal is set forth in full at page 27 of the record on file herein.

JURISDICTION.

On July 26, 1951, the Supreme Court of the State California denied a petition for a rehearing in this cause. On October 18, 1951, the Supreme Court of the United States made its order extending time within which to file petition for writ of certiorari to and including December 21, 1951. On October 22, 1951, petitioners notified respondent of said order extending time. The jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 U.S.C., Section 1257(3).

The federal questions presented for review in this petition were properly raised at the earliest and also at every opportunity, throughout the entire history of this cause:

In the trial court by oral objection of counsel (R. 16):

> (Reporter's Transcript, p. 11) "Mr. Deasy: 'No, I have no questions of the Sheriff, and I object, may it please the Court, upon the ground that the statute under which they are endeavoring to forfeit this money is invalid in that it denies the respondents due process of law to the extent that in the statute itself it provides no method or time or place where hearings may be had and I feel that the law is settled by the case of People v. Broad, 216 Cal. at page 7, in which the Supreme Court of the State of California states, among other things, "that where the statute authorizes the taking of private property, but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation." * * *' "

The timely raising of a federal question was acknowledged by the court (R. 17):

> (Reporter's Transcript, p. 12) "The Court: 'Well, I have examined the authorities that you had heretofore and the authorities that Mr. Deasy had and then I made an indepedent search myself. I spent quite a little time on it and I can't find any authority in the United States that says the Court can confiscate money. There is the California case that goes so far as to hold that the moneys seized in a raid of slot machines, the money being in the machines can't be confiscated, so if you can't confiscate the money in the machines—in the slot machines why you can't confiscate money on a gambling table * * *' "

In the appellants' briefs on appeal before the California District Court of Appeal (Appendix A, pp. i-iv).

In appellants' answer to respondents' petition for a hearing in the Supreme Court of the State of California (R. 34).

In appellants' briefs on appeal before the Supreme Court of the State of California (Appendix A, p. v) and in oral argument before the District Court of Appeal and the Supreme Court of the State of California.

Both the District Court of Appeal and the Supreme Court of the State of California failed or refused to refer to or to pass upon these federal questions in their opinions. The California Supreme Court attempted to rest its decision on other grounds, but in so doing put its decision in direct conflict with important provisions of the Federal Constitution.

Petitioners respectfully submit that, even if a federal question had not been raised in the lower courts, the action of the California Supreme Court, in nullifying a proper statute of the State of California, is so clear an exercise of the legislative function by the judicial branch of the state government as to leave petitioners only one possible recourse: the jurisdiction of the Supreme Court of the United States to review decisions of the highest state courts where fundamental rights, titles and immunities are claimed under the Federal Constitution. Petitioners furthermore re-

spectfully submit that, in the light of the unanimous decision of the District Court of Appeal of the State of California, petitioners could not anticipate the action of the Supreme Court of the State of California, and were understandably surprised when it refused to give effect to a valid mandatory statute of the State of California.

QUESTIONS PRESENTED.

The questions relied upon by petitioners as bases for granting of a writ of certiorari are:

(a) whether a state court can, by refusal to follow an applicable, mandatory and unequivocal state statute, nullify and repeal the duly enacted laws passed by the Legislature.

(b) Whether a state court can impose a forfeiture where such forfeitures are expressly prohibited by statute.

(c) Whether a state court can impose, in direct violation of the applicable penal statute, extra and additional penalties upon certain individuals not included in any reasonable classification by legislative enactment.

A question upon which there appears to be no conflict, which petitioners intend to raise if this petition for writ of certiorari is granted: Whether the highest state court can effectively destroy a title to property by refusing the return of said property to the owners

after the trial court has specifically refused the forfeiture of the property, and after that decision has become *res judicata* by failure of respondents to appeal therefrom.

STATUTES INVOLVED.

Section 2604, Penal Code of the State of California (Appendix B).

Section 330, Penal Code of the State of California (Appendix B).

STATEMENT OF FACTS.

Petitioners were arrested in August of 1945 and charged with the violation of Section 330 of the Penal Code of the State of California, which section defines and prohibits the act of gaming. At the time of their arrest, the Sheriff, respondent herein, and his deputies seized certain dice, dominoes, playing cards and lottery tickets. From the table or tables at which petitioners were seated, they also seized $6,248.25 in money. The County of Contra Costa filed a petition in the Superior Court of said county, praying for an order authorizing the destruction of the cards, dice, etc., and for the forfeiture of the money to the county. Petitioners brought an action against respondent James Long, as Sheriff, and Francis W. Collins, as District Attorney, for the recovery of the money. The two cases were consolidated for trial and the court, while denying the county's prayer for the

forfeiture of the money, also denied petitioners a recovery in their action.

Petitioners appealed to the District Court of Appeal of the State of California, First Appellate District, Division Two, and on November 16, 1950, the District Court of Appeal reversed the decision of the Superior Court of the State of California, in and for the County of Contra Costa, as to respondent James Long. The primary issue before the Appellate Court was the application of Section 2604 of the Penal Code of the State of California, which provides: "No conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture *is expressly imposed by law.*" (Emphasis ours). The Appellate Court held that this section specifically forbids any forfeiture of any property except in cases where forfeiture is expressly imposed by law, and unanimously held that petitioners are entitled to the return of their money.

On June 29, 1951, the decision of the District Court of Appeal of the State of California was reversed by the Supreme Court of the State of California by a four-to-three majority. Petitioners' timely petition for a rehearing before the Supreme Court of the State of California was denied on July 26, 1951.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of California erred:

1. In refusing to follow the specific applicable statute in this cause.

2. In imposing a forfeiture expressly prohibited by statute.

3. In imposing extra penalties and punishment upon certain individuals not included by the Legislature in any reasonable classification under the police power.

4. In refusing to give effect to a proper decision of the trial court, which decision created and affirmed a title to property, and which said decision had become *res judicata* and was not before the Supreme Court of the State of California on appeal.

5. In reversing the California District Court of Appeal.

REASONS FOR GRANTING A WRIT OF CERTIORARI.

There are three cardinal reasons why it is of the highest importance that the writ of certiorari herein prayed for be granted. First, the decision of the California Supreme Court creates an irreconcilable conflict with several important lines of decisions of the Supreme Court of the United States. Second, the decision of the California Supreme Court is in direct conflict with and in derogation of the important provisions of the Federal Constitution. Third, the de-

cision of the California Supreme Court, if allowed to stand, will have serious and widespread effects upon large numbers of people throughout the entire Union.

(1) The conflict created.

The decision of the California Supreme Court is in conflict with and would nullify the effect of a long line of decisions under Article III of the Federal Constitution. Under that article, and under Article I of the Federal Constitution as well, the courts have always been restrained from exercising the powers of the Legislature. The principle of division of powers between the three branches of the Government has allowed the three branches to perform their proper functions and has allowed also the delegation of certain powers from one department of the Government to another—but has never and should never be so interpreted as to allow the usurpation by one branch of the most vital functions of another, and a total disregard by the judiciary of the statutes enacted by the Legislature. From the earliest days of this Republic, the Supreme Court of the United States has protected this principle from its detractors. In *Gelston v. Hoyt,* 16 U.S. 246, the Supreme Court refused to rewrite the law properly the province of the Legislature. In *United States v. Palmer,* 16 U.S. 610, the Court remained, as it should have, bound by a clear and intelligible statute. The cases which have followed these early decisions are so numerous as to prohibit reference in a brief petition and are so clearly the law of the land as to forestall argument on this point.

In brief, it is the function of the judiciary to apply the law as it finds it; it is beyond the inherent powers of any judicial body to ignore, and by judicial legislation, repeal and nullify a statute. Such nullification has no resemblance to the power and proper duty of the judiciary to pass upon the constitutionality of statutes. The California Supreme Court in its decision herein has simply refused to apply Section 2604 of the Penal Code of the State of California, after that statute was relied upon by petitioners and called forcibly to the attention of the Court. The wording of the opinion of the Court cannot alter the fact of the Court's refusal to apply the statute as passed, and as framed in clear and concise language by the Legislature. It is important that such action be not allowed to stand. More is involved than the property of petitioners—if this decision stands, the California court can refuse to apply other statutes at its pleasure. No reasonable limit can be placed upon such action; if the California Supreme Court prevails in this one case, there is absolutely no logical reason why it cannot capriciously refuse to apply any—or all—of the statutes of the State of California in any case.

(2) The imposition of a forfeiture by the court where forfeiture is specifically prohibited by law.

The words of Section 2604 of the Penal Code of the State of California are clear. The refusal of the California Supreme Court to apply it denies to petitioners the fundamental substantive due process of law guaranteed to them under the Fourteenth Amendment of the Federal Constitution. The amendment controls

all of the agencies of the State—including its judiciary. Due process of law surely means more than the protection of a procedural system. Surely it means a protection of the substantive rights of the individual, affording him more than a mock trial, with all the procedural trappings, including a costly and lengthy appellate procedure—with, at the end of all the procedures, a refusal by the highest court of this state to apply the statutes of the state to his case. Petitioners here make no complaint regarding the procedural aspects of their cause. Nor do they claim that the hearings were fatally infected with a failure to observe the fundamental fairness essential to the very conception of justice. Absolutely no inference is intended regarding the integrity of the court below. But the facts remain that petitioners are persons under the protection of the Fourteenth Amendment; that they have been accorded procedural due process; that their property was seized; that the trial court refused to return it and refused also to forfeit it to the state; that the District Court of Appeal of the State of California applied the statute (Section 2604 of the Penal Code of the State of California), and that the California Supreme Court has refused to follow the command of the Legislature. Petitioners respectfully submit that they have had due process, but not due process *of law*.

It is important that such action be not allowed to stand. If this decision is affirmed, litigants may be accorded all the apparent protection of proper procedure, and then find themselves—as do petitioners—stripped of life, liberty or property by a court which

refuses to apply a statute clearly and expressly enacted for their protection. Here, too, the decision complained of will affect not just petitioners but millions of others as well. (*Brinkerhoff-Faris Trust and Savings Company v. Held,* 281 U.S. 673.)

(3) The imposition of extra and additional penalties upon certain individuals.

Under the Fourteenth Amendment to the Federal Constitution, all persons are entitled to the equal protection of the laws. This principle may not be violated by the state through any of its agencies, including the judiciary. (*Sunday Lake Iron Company v. Wakefield Township,* 247 U.S. 350.) Petitioners find themselves denied the return of their property by the California Supreme Court which has refused them the protection of Section 2604 of the Penal Code of the State of California—a statute clearly intended for the protection of persons in exactly the same circumstances as petitioners. If the code section (Section 2604 of the Penal Code of the State of California) means anything, it means that petitioners' property may not be forfeited. This is not a matter of interpretation and construction of statutes, since the language of the statute is clear. Petitioners submit that they have not been subjected to a penalty as a result of their proper inclusion, by the Legislature, in any reasonable classification under the legislative exercise of the police power. The contrary is true—the Legislature has included petitioners, along with all others, under the express protection of a statute designed to forbid and render impossible the forfeiture of their property.

To say that the decision of the California Supreme Court is not a penalty or forfeiture is pure sophistry. Petitioners stand deprived of their property; they lost the possession thereof by seizure; they have demanded its return, and the California Supreme Court has based its refusal upon the circumstances surrounding their loss of possession. Petitioners are not treated like other litigants; they are denied the protection of the statute enacted for the specific purpose of protecting them.

It is important that such action be not allowed to stand. Even worse than judicial repeal of a statute is the spectacle of judicial refusal to apply a statute *to a certain individual or group.* If the decision stands, no person can go before the California Supreme Court secure in the knowledge that *any* of the statutes of the State of California or any of the protections of the Federal Constitution will not be captiously ignored in his particular case. The litigant with inalienable rights becomes a supplicant with none.

THE IMPORTANCE UNDER FEDERAL LAW AND ON THE GROUNDS OF PUBLIC POLICY OF THE GRANTING OF THIS WRIT OF CERTIORARI.

1. It is of great importance that the decision of the Supreme Court of the State of California in this cause be reversed so as to bring the decision of that Court into line with the consistent holdings of the Supreme Court of the United States.

2. It is important that the decision by the Supreme Court of the State of California be reversed in order

to uphold three important federal constitutional principles. These principles are (a) principle of division of powers between the departments of government, (b) the guarantee of substantive due process of law to every person and (c) the guarantee of equal protection of the laws to every person.

3. It is important that the decision complained of be reversed because, if it is allowed to stand, it will inevitably affect the lives, property and liberty of millions of individuals and is obviously susceptible to enlargement so as to adversely affect the welfare of all of the people of the State of California and the security of their rights under the law.

CONCLUSION.

For the foregoing reasons, this p'ition for a writ of certiorari should be granted.

Dated, Oakland, California,
December 17, 1951.

Respectfully submitted,

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(Appendices A and B Follow.)

Appendix A

Excerpts from Appellants' Opening Brief in the District Court of Appeal, 1 Civil No. 14,322 (p. 14, line 28 to p. 15, line 11):

Respondents, then, have no right whatsoever to the money, and this fact has become *res judicata* by reason of the decision of a Court of competent jurisdiction, from which decision respondents have not appealed. Appellants clearly have the superior equities: their initial possession of the property is not denied, their ownership of the money is not denied, and there is no allegation that they procured the money illegally. Equity follows the law and will not apply its principles in contravention of constitutional, statutory or common law. The "clean hands" doctrine, therefore, cannot be used to bar appellants claim, since failure to restore their property after the denial of its forfeiture to the State did, as mentioned above, violate the due process clause of the Fourteenth Amendment.

(p. 15, line 24 to p. 17, line 8):

Property once reduced to ownership must continue to be owned by someone; title cannot be in abeyance. Respondents can assert no claim to the money in question. The denial of forfeiture is conclusive of their rights. In *Gelston v. Hoyt,* 16 U.S. 246, Justice Story said:

> "Where property is seized and libelled as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be right-

ful and the forfeiture incurred or not. The decree of the court in such cases acts upon the thing itself, and binds the interest of the whole world, whether any party actually appears or not. If it is condemned the title of the property is completely changed and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of the forfeiture is completely removed and cannot be re-annexed to it. The original owner stands upon his title, discharged of any latent claims with which the supposed forfeiture may have previously infected it. A sentence of acquittal in rem does not, therefore, ascertain a fact as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. It should, therefore, be conclusive on the world of the nonexistence of the forfeiture for the same reason that a sentence of condemnation is conclusive of the existence of the title of forfeiture. *It would be strange, indeed, if when the forfeiture ex directo could not be enforced against the thing, but by an acquittal was purged away, that indirectly the forfeiture might be enforced through the seizing officer; and that he should be at liberty to assert a title, for the Government, which is judicially abandoned by or conclusively established against the Government itself.*"

The facts of the above quoted case are highly analogous to appellants' claim. The holding of this case, although decided prior to the enactment of the Fourteenth Amendment, is conclusive as to the proposition that neither the respondents nor the State of California

can now assert any title to the money in question, and that a withholding of possession from appellants amounts to an illegal forfeiture, unsupported by statute or judicial action. Appellants, whose title has never been disputed, remain the rightful owners and prior possessors of this money, and are therefore entitled to its restoration.

Excerpt from Appellants' Reply Brief in the District Court of Appeal (p. 21, line 7 to p. 22, line 13):

VI. RESPONDENTS HAVE FAILED TO ANSWER APPELLANTS' MAJOR CONTENTIONS, WHICH ARE:

(1) APPELLANTS HAVE THE SUPERIOR EQUITIES IN THE FUND IN QUESTION.

(2) THE ATTEMPTED CONFISCATION OF THE FUND IS ILLEGAL.

(3) APPELLANTS HAVE BEEN DEPRIVED OF SUBSTANTIVE DUE PROCESS BY THE JUDGMENT OF THE TRIAL COURT AND THE REFUSAL OF RESPONDENTS TO RETURN APPELLANTS' MONEY.

(4) TITLE TO THE FUND CANNOT BE IN ABEYANCE BECAUSE OF RESPONDENTS' SEIZURE THEREOF.

Appellants respectfully submit that the instant case is somewhat unusual. Lack of authority on all fours with this fact situation may well reflect that governmental subdivisions of this state have not in the past refused the return, after any possible legitimate use as evidence, of property informally seized from its citizens. Having pointed out the inapplicability of respondents' only two seriously advanced defenses, that is, the effect of 29704 of the Government Cod

and the contention that appellants did not have possession of their funds at the time of seizure, appellants respectfully remind the Court that respondents have failed utterly to dispute appellants' fundamental propositions:

(1) That appellants clearly have the superior equities in the funds in question.

(2) That the attempted forfeiture so far imposed by respondents is improper and illegal.

(3) That appellants are denied substantive due process through the anachronistic decisions of the trial Court in refusing the forfeiture and yet allowing the withholding of appellants' property.

(4) That respondents have not and cannot set up any title or interest to the money in question, in either respondents themselves, the State of California, or any other persons whatsoever.

Excerpt from Appellants' Answer to Petition of Respondent for Hearing by the Supreme Court (p. 17, lines 3 to 21):

Appellants clearly recognize, and are willing to meet head on, any question of social policy inherent in this case; but appellants submit that we are concerned here not with "crime commissions", nor with "special committees to investigate organized crime". Appellants are concerned with the respondent's refusal to return their money. The opinion of the

District Court represents no backward step by the State of California. The authority of no applicable case is challenged or weakened by the opinion of the District Court, no principle of law or equity is abrogated, no statute is nullified by judicial legislation, when appellants prevail: confiscation and illegal seizure of private property are once again rejected, as they should be, by the Court, and proper separation of the three branches of our governmental system are once again preserved and respected, as they should be; that is, the Court has refused to overrule by fiat the clear intent of our Legislature.

Excerpt from Appellants' Reply to Amici Curiae Brief in Opposition to Decision of District Court of Appeal, in the Supreme Court of the State of California, S.F. No. 18,026 (p. 13, line 20 to p. 14, line 3):

If the Penal Code is to be applied as intended by the Legislature, if section 2604 of that Code is not to be repealed by the Courts, if the statutory penalty for gambling is not to be increased to include all the worldly goods of the law-violator at the discretion of the peace officer, if the common and constitutional law regarding forfeitures is not to be rewritten, and if substantive due process is to remain a meaningful term in our law, then appellants respectfully pray that this Honorable Court correct the illegal forfeiture thus far enforced against appellants, and that the decision of the District Court of Appeal be affirmed.

Appendix B

Section 2604, Penal Code of the State of California:

No conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of the State, in the nature of a deodand, or where any person shall flee from justice, is abolished. (Added by Stats. 1941, ch. 106, Sec. 15.)

Section 330, Penal Code of the State of California:

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge-et-noir, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor, and shall be punished by a fine not less than one hundred dollars nor not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. (Enacted 1872; Am. Stats. 1885, p. 135: Stats. 1891, p. 57.)